

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ROUNDY'S INC,

CASE 30-CA-17185

and

**MILWAUKEE BUILDING AND
CONSTRUCTION TRADES
COUNCIL, AFL-CIO**

BRIEF OF UNITED WAY WORLDWIDE AS *AMICUS CURIAE*

John L. Telford, Jr.
John A. Lambremont
LITTLER MENDELSON, P.C.
3344 Peachtree Road, N.E.
Suite 1500
Atlanta, Georgia 30326.4803
Telephone: (404) 233-0330

*Counsel for Amicus Curiae
United Way Worldwide*

TABLE OF CONTENTS

I.	Introduction	1
II.	Interest of the Amicus	2
III.	The NLRB Should Carefully Consider The Value Of Workplace-Based Charitable Involvement Before Announcing Any Rule That Could Negatively Impact UWW’s Ability To Effectively Carry Out Its Mission	6
IV.	Conclusion	8

TABLE OF AUTHORITIES

National Labor Relations Board Cases

<u>Farm Fresh Inc.</u>	
326 NLRB 997 (1998).....	6
<u>George Washington University Hospital</u>	
227 NLRB 1362, 1373-1374 and n. 39 (1977).....	7
<u>Register Guard</u>	
351 NLRB 1110 (2007).....	2, 7
<u>Rochester General Hospital</u>	
234 NLRB 253 (1978).....	7
<u>Sandusky Mall Co.</u>	
329 NLRB 618 (1999).....	1, 6, 8
<u>St. Luke’s Memorial Hospital</u>	
342 NLRB 1040, 1047 (2004).....	7
<u>Teltech Holdings</u>	
342 NLRB 924 (2004).....	7

Federal Cases

<u>6 West Ltd. Corp. v. NLRB</u>	
237 F.3d 769, 779-780 (7 th Cir. 2001)	7
<u>Cleveland Real Estate Partners v. NLRB</u>	
95 F.3d 457, 465 (6 th Cir. 1996)	7
<u>Four B Corp. v. NLRB</u>	
163 F.3d 1177, 1183 (10 th Cir. 1998).....	8
<u>Lucille Salter Packard Children’s Hosp. v. NLRB</u>	
97 F.3d 583, 587 (D.C. cir. 1996).....	8
<u>Salmon Runn Shopping Ctr. LLC v. NLRB</u>	
534 F.3d 108 (2d Cir. 2008)	7

I. INTRODUCTION

Amicus Curiae United Way Worldwide (“UWW”) respectfully submits this brief for the National Labor Relations Board’s (“NLRB” or “Board”) consideration in connection with those issues left undecided in *Roundy’s Inc.*, 356 NLRB No. 27 (2010). As discussed more fully below, UWW and its constituent community-based member organizations rely on access to the workplace to not only raise funds for charitable purposes, but to engage individual and corporate donors in a much broader and profound way to improve lives and communities. This important work involves connecting with individuals and businesses to not only give, but to advocate and volunteer. Focusing on targeted goals, United Way invites donors to join together to champion important social issues and to bring their passion and expertise in volunteering in community service projects. Investing time and money through workplace campaigns is a key way for individuals to support this important community work across the United States. Consequently, UWW respectfully encourages the NLRB to consider carefully the value of workplace-based charitable involvement before announcing any rule on non-employee property access rights that could impair United Way’s ability to effectively carry out its mission.

Pursuant to the Notice and Invitation to File Briefs, this Brief shall address each of the issues posed (in no particular order), including:

- (1) In cases alleging unlawful employer discrimination in non-employee access, should the Board continue to apply the standard articulated by the Board majority in Sandusky Mall Co., 329 NLRB 618 (1999)?
- (2) If not, what standard should the Board adopt to define discrimination in this context?

- (3) What bearing, if any, does Register Guard, 351 NLRB 1110 (2007), enf. denied in part 571 F.3d. 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in non-employee access cases?

II. INTEREST OF THE AMICUS

UWW is part of, and works in conjunction with, a worldwide movement of nearly 1,800 community-based United Way member organizations ("Local United Ways" or "LUWs"). There are more than 1,110 United Way members in this country that rely on workplace campaigns to fund and advance their community impact work. Focusing on education, income and health initiatives, UWW and all of the various community-based LUWs (collectively referred to as the "United Way") are committed to advancing the common good and creating opportunities for a better life for all. Unlike other non-governmental organizations, United Way organizations engage all sectors – public, private and civil society – at the community level. United Way constantly strives to mobilize individuals to become change agents in their own communities so that they can improve their own living conditions, as well as the living conditions of others. Indeed, by working at the local level, the United Way movement addresses the root causes of a wide range of issues affecting families and individuals.

United Way is the largest non-government funder of human services in the United States, distributing approximately \$3.04B to agencies and programs across communities.. United Way partners with more than 37,000 different agencies, and provides monetary and logistical support on an informal basis to an additional 77,000 agencies. Additionally, United Way distributes more than \$850 million in leveraged resources to communities across the country. This is accomplished through in-kind gifts, generous volunteer time, and leveraged funds from United Way's community partners (agencies, businesses, government, community coalitions, etc.).

United Way inspired more than two million volunteers to invest 18.6 million hours of service in 2009. (This service is valued at \$376 million.)

United Way is able to garner these resources only through the generosity of its partners across all sectors of society and the economy. United Way is by far the largest generator of workplace philanthropy in the United States. Although it is the nation's largest privately funded charity – with approximately \$3.85B in contributions in 2009-2010 alone – it is at heart a grass roots structure run from the bottom up. Although donations received directly from companies play an important role in United Way's ability to carry out its mission, one cannot overstate the importance to United Way of individual employee donations. In fact, LUWs typically receive donations from approximately 10 million separate donors, with these individual-based donations making up a substantial percentage of total annual contributions. And a very substantial proportion of those individual-based contributions are the product of United Way campaigns that take place annually in workplaces across the United States.

Workplace campaigns are essential to United Way fundraising. These campaigns, through payroll deduction, are effective because they provide employees a vehicle to donate to charities on a regular and sustainable basis. United Way campaigns have been shown to be particularly effective as the partnership between local United Ways, the communities they serve and corporations create a compelling case for giving. Monies raised are used in the local communities of each donor to address those problems identified as critical to the community. There is a long tradition of giving through payroll deduction and both employers and employees take great pride in participating in campaigns. The workplace also provides a valuable venue to encourage volunteerism and engagement. Working with United Way, employees have the opportunity to learn more about the needs of their community and to participate in organized

volunteer opportunities. Employees benefit from the enthusiasm and inspiration generated by workplace campaigns.

To provide a better sense of the scope and nature of the services United Way provides to communities, in 2009 United Way distributed \$544M to support family services initiatives; \$597M to support health initiatives; \$435M to support projects targeting youth and social development; \$288M to support food, clothing, housing, and transportation; \$262M to enhance public protection and safety; \$253M to support day care for children and adults; \$182M to support community development projects; \$165M to further job training and employment services; \$132M to fund “ready to learn” projects; and an additional \$82M to support other important programs and initiatives at the community level. United Way funding makes a real difference in improving quality of life and opportunity in many key areas of society. And a substantial portion of the resources United Way was able to bring to bear last year would not have been available absent the contributions generated through workplace fundraising drives.

Continued funding is absolutely crucial for United Way to maintain, advance, and expand its work in the future. United Way has set forth some very ambitious but achievable goals to improve and increase the level of services it brings to local communities across the United States in years to come. For example, United Way has targeted financial stability among lower-income families and is taking the lead in implementing and supporting initiatives to help bring stable employment, income support, the ability to save and plan for the future, more manageable household expenses, and more affordable housing costs to families in need. In the area of healthcare, United Way has set long term goals to increase the number of youths and adults who are healthy and avoid risky behaviors. United Way will also continue to focus on education and devote substantial resources toward improving the high school drop out rate.

United Way secures resources through charitable contributions that many well-meaning people would not otherwise make but for the ability to donate small amounts on a regular basis through payroll deduction. Payroll deduction allows individuals to give as little as \$10 per pay period, which is more affordable than a lump sum donation and yet is equally significant. Having the opportunity to donate to charity through payroll deduction has a very real and positive impact on individual philanthropy and receiving those funds is a lynchpin in United Way's overall mission to have a real, palpable, and positive community impact.

United Way is proud of its long history of partnership and cooperation with both organized labor and the business community alike. United Way works hard to be a valuable partner in helping employers achieve their philanthropic goals and has developed significant relationships with 53% of the U.S.'s Fortune 500 companies. Accounting for approximately 7% of total corporate giving each year in the United States, United Way typically receives close to \$1.0B annually in corporate donations.

Equally important, United Way's partnership with organized labor is built on almost seven decades of working together to improve communities across America. In 1942, UWW's predecessor, Community Chests, and organized labor entered a cooperative agreement intended to encourage labor representation on Community Chests boards and councils, and encouraging recognition of union members' contributions. Then, in 1946, United Way established the Department of Labor Participation with the goal of joining United Way, labor and health and welfare agencies in a cooperative, community effort to bring services and people together. To accomplish this goal, LUWs across the country began employing AFL-CIO Community Services liaisons. These liaisons facilitate the provision of services to members of organized labor, their families and the community, and facilitate collaboration on fundraising and community

development. Currently, there are approximately 160 AFL-CIO Community Services Liaisons on the staff of LUWs throughout the U.S., and 20 separate labor agencies receiving United Way funding. So strong is the partnership between United Way and organized labor that there are currently three AFL-CIO representatives serving on the UWW U.S. Board of Trustees.

Consistent with its history of cooperation and partnership with organized labor, UWW respects and supports the right of employees to seek union representation in the workplace. However, UWW is wary of any change to the Board's analysis in this area that could have the unintended consequence of limiting United Way access to employees in the workplace. United Way is greatly concerned that its ability to directly solicit donations and engage employees will be negatively impacted, thereby hampering its ability to accomplish the core mission of serving communities across this country.

III. THE NLRB SHOULD CAREFULLY CONSIDER THE VALUE OF WORKPLACE-BASED CHARITABLE INVOLVEMENT BEFORE ANNOUNCING ANY RULE THAT COULD NEGATIVELY IMPACT UWW'S ABILITY TO EFFECTIVELY CARRY OUT ITS MISSION.

In formulating a standard for reviewing claims of discrimination in prohibiting solicitation or access in the workplace, UWW believes that the Board should continue to take into consideration the character of the solicitation or requested access. Such an approach would be consistent with Board decisions both before and after Sandusky. For example, in Farm Fresh Inc., 326 NLRB 997 (1998), the Board specifically held that it will find a discrimination violation "only if the General Counsel shows that the employer has refused non-employee union organizers admittance while at the same time allowing other groups or organizations to engage in comparable conduct." See also Rochester General Hospital, 234 NLRB 253 (1978) (Red Cross poster and blood collection in hospital for blood bank, poster of sales by a volunteer group which donated proceeds to hospital, displaying of pharmaceutical products that doctors might

prescribe or pharmacy might purchase, and display of medical books of interest to doctors are work-related activities that assist hospital in carrying out community health care functions and responsibilities and not such disparate application that would require the employer to waive its rule and permit access to others); George Washington University Hospital, 227 NLRB 1362, 1373-1374 and n. 39 (1977) (white elephant sales and sales of the Women's Board are excluded from analysis of disparate activities as they are virtually an integral part of the hospital's necessary functions); Teltech Holdings, 342 NLRB 924 (2004) ("It is so dissimilar that it is difficult to find that Respondent waived its no-solicitation, no-distribution policy by allowing the food vendor to sell hot dogs in the parking lot."); St. Luke's Memorial Hospital, 342 NLRB 1040, 1047 (2004) (allowing a stack of regional newspapers to be placed in a cafeteria did not invalidate non-solicitation policy); Register Guard, 351 NLRB 1110 (2007) (holding that an employer might legitimately draw a line between "business-related use" and "non-business-related use" of its e-mail system, among other similar distinctions (e.g., charitable solicitations and non-charitable solicitations)).

Similarly, the Federal Courts consistently require an evaluation of the nature of the conduct that had been permitted before finding that unlawful discrimination has occurred. See, Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 465 (6th Cir. 1996); Salmon Run Shopping Ctr. LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008), denying enf. 348 N.L.R.B. 658 (2006); 6 West Ltd. Corp. v. NLRB, 237 F.3d 769, 779-780 (7th Cir. 2001), denying enf. 330 NLRB 527 (2000); Four B Corp. v. NLRB, 163 F.3d 1177, 1183 (10th Cir. 1998); Lucile Salter Packard Children's Hosp. v. NLRB, 97 F.3d 583, 587 (D.C. Cir. 1996).

While UWW is not suggesting exactly where the line between allowable and restricted conduct should be drawn, it does believe the Board should continue to take into some

consideration the character of the solicitation or access at issue and should, at a minimum, recognize the fundamental value of charitable solicitation and the very strong public policy in favor of workplace giving.

IV. CONCLUSION

For the foregoing reasons, UWW respectfully requests that the Board carefully consider the value of workplace-based charitable involvement before announcing any rule – such as a blanket reaffirmation of Sandusky – that could negatively impact the ability of charitable organizations to effectively carry out their mission.

Respectfully submitted this 7th day of January, 2010.

s/ John L. Telford, Jr.

John L. Telford, Jr.

John A. Lambremont

LITTLER MENDELSON, P.C.

3344 Peachtree Road, N.E.

Suite 1500

Atlanta, Georgia 30326.4803

Telephone: (404) 233-0330

*Counsel for Amicus Curiae
United Way Worldwide*

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2010, I caused a true and correct copy of the foregoing **BRIEF OF UNITED WAY WORLDWIDE AS *AMICUS CURIAE*** to be served via U.S. Mail on the following:

Andrew S. Gollin
National Labor Relations Board
310 West Wisconsin Avenue
Suite 700W
Milwaukee, WI 53203
andrew.gollin@nrlb.gov

Mr. Scott A. Gore, Esq.
Laner, Muchin, Dombrown, Becker, Leving and Tominberg, Ltd.
515 North State Street
Suite 2800
Chicago, IL 60654
sgore@lanermuchin.com

Mr. Yingtao Ho, Esq.
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman
1555 North Rivercenter Drive
Suite 202
P.O. Box 12993
Milwaukee, Wisconsin 53212
yh@previant.com

s/ John L. Telford, Jr.

John L. Telford, Jr.
LITTLER MENDELSON, P.C.

*One of the Attorneys for Amicus Curiae
United Way Worldwide*